UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MICHAEL HICKEY,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 92-105-B***
	)	
DONNA E. SHALALA,	)	
Secretary of Health	)	
and Human Services,	)	
	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION [1]

This Social Security Disability appeal raises the question whether substantial evidence supports the Secretary's findings that the plaintiff retains the residual functional capacity to perform his past relevant work as an order clerk and to do other work in the national economy, subject to limitations.[2] The plaintiff asserts that these findings are not supported by competent evidence and, further, that the decision is flawed because the hypothetical question directed to the vocational expert assumed facts not in evidence.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. 404.1520;

[1] This action is properly brought under 42 U.S.C. S 405(g). The Secretary has admitted that the plaintiff has exhausted his administrative remedies. This case is presented as a request for judicial review by this court pursuant to Local Rule 12, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on March 1, 1993 pursuant to Local Rule 12(b) requiring the parties to set forth their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record. The plaintiff's counsel failed to appear for oral argument. His absence was unexcused.

[2] This is the plaintiff's second application for disability insurance benefits. The first was filed July 5, 1989 and was denied September 12, 1989. The second application was filed December 14, 1989. In assessing this application the Administrative Law Judge declined to reopen or revise the first, citing 20 C.F.R. 404.988 and 404.989. Record p. 12. The plaintiff does not assert that the prior case should be reopened.

Goodermote v. Secretary of Health & Human Servs., 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity since June 24, 1986 (although he receives $231.17 weekly in workers' compensation benefits) and met disability insured status requirements as of that date, Findings 1-2, Record p. 16; that he has severe chronic low back pain but does not have any impairment which meets or equals those listed in Appendix 1, Subpart P, 20 C.F.R. 404, Finding 3, Record p. 16; that the degree of incapacity he asserts is not consistent with the record as a whole, Finding 4, Record p. 16; that he ``has the residual functional capacity to perform the physical and non-exertional requirements of sedentary work except for a need to alternate between sitting and standing [and] limitations on bending . . .," Finding 5, Record p. 16; that because his previous work as an order clerk did not require activities precluded by these limitations he was not prevented from doing his past relevant work, Findings 6-7, Record p. 16; that he is a younger individual (40) with a high school education and a work history that can be applied to meet the requirements of semi-skilled work, Findings 8-10, Record p. 17; that his exertional capacity for sedentary work, age, education and work experience place him within Rule 201.29 of the ``Grid" (Table No. 1, Appendix 2, Subpart P, 20 C.F.R. 404) and direct a conclusion of ``not disabled," Finding 11, Record p. 17; that despite an inability to do a full range of sedentary work, there exists a significant number of jobs in the national economy that he could perform, Finding 12, Record p. 17; and that, accordingly, the plaintiff was not disabled at any time through the date of decision, Finding 13, Record p. 17. The Appeals Council declined to review the decision, Record pp. 5-6, making it the final determination of the Secretary. 20 C.F.R. 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. 405(g); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions

drawn. *Richardson v. Perales,* 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.,* 647 F.2d 218, 222 (1st Cir. 1981).

The Administrative Law Judge first determined that the plaintiff could return to his past relevant work. At Step Four of the evaluative process the burden is on the plaintiff to show that he cannot perform his past relevant work. *Goodermote,* 690 F.2d at 7, 20 C.F.R. 404.1520(e). In determining this issue, the Secretary must make a finding of the plaintiff's residual functional capacity, a finding of the physical and mental demands of past work and a finding as to whether the plaintiff's residual functional capacity would permit performance of that work. 20 C.F.R. 404.1520(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service,* at 813 (1983).

During the course of his testimony, the plaintiff stated that he ``[h]as to lay [sic] down three to four times a day." Record p. 38. He asserts that this would effectively preclude him from being employed (presumably with regard to both past relevant work and other work in the national economy). He contends that the only evidence of record to rebut his allegations of the need to lie down is the report of Dr. Lawrence Leonard, an orthopedist, who apparently examined him on behalf of the claimant's previous employer's insurance carrier in connection with a workers' compensation claim. *See* Plaintiff's Itemized Statement of Specific Errors; Record pp. 282-85.

Dr. Leonard's report states:

> The patient notes that sitting is a problem and after about an hour he has to get up and move around. After moving around for a few minutes, he gets back down to Grade 3 to 4 [pain] level. Lying down, he states, is terrible and he is comfortable up to an hour only and then he stiffens up. Walking is fine and he states that this is the only thing he can do and he does go out for a 2 mile walk four times a day. He notes that this eases the pain.

Id. p. 283. Dr. Leonard indicated that the plaintiff was capable of working at a job where he could change positions or where walking was involved and where he could lift up to 25 pounds but not be

required to do repetitive bending. *Id*. p. 285.

The plaintiff argues that because Dr. Leonard is not a ``consultative examiner" and his examination was not ``objective," the Administrative Law Judge's determination was not supported by competent evidence. The regulations do not explicitly define the term ``consultative examiner." However, they do describe a consultative examination as ``a physical or mental examination or test purchased for [a claimant] at [the Secretary's] request and expense from a treating physician or psychologist, another source of record, or an independent source, including a pediatrician when appropriate." 20 C.F.R. 404.1519. The Social Security Administration or the state agency making the disability determination will purchase a consultative examination only from a ``qualified" medical source, *i.e.* one currently licensed in the state and having the training and experience to perform the type of examination or test required. 20 C.F.R. 404.1519g. Therefore, a ``consultative examiner" is a ``qualified" medical source who performs such a consultative examination. By this definition it is true that Dr. Leonard was not a ``consultative examiner" in this case.

However, this does not mean that his findings are not competent evidence. In determining if a disability exists, the approach to evidence is inclusive, not exclusive. Section 404.1512(b) defines ``evidence" as

> anything [the claimant] or anyone else submits to [the Secretary] or that [the Secretary] obtain[s] that relates to [the] claim. This includes, but is not limited to [a list which includes objective medical evidence as defined in section 404.1528(b) and (c) (signs, symptoms, and laboratory findings), other evidence from medical sources such as medical history, opinions and statements about treatment received, and information from other sources as described in section 404.1513(e) which include even non-medical sources and ``other" practitioners].

20 C.F.R. 1512(b). Dr. Leonard's opinion falls into one or more of these categories, and must therefore be considered as evidence. The weight to be given his report was for the Administrative

Law Judge to determine, within the framework of section 404.1527. There is nothing in the record which suggests that the Administrative Law Judge was not free to credit Dr. Leonard's report as he did.

The plaintiff also asserts that the Administrative Law Judge's finding that the plaintiff is not disabled is not supported by substantial evidence because the hypothetical question he asked the vocational expert was flawed in that there was no basis for it in the evidence of record. In particular, the plaintiff states that there is no evidence concerning the plaintiff's medical ability to work a full day.

In evaluating vocational issues, an administrative law judge may engage the services of a vocational expert to assist in determining the transferability of work skills and the specific jobs in which they can be used and for ``similarly complex" issues. 20 C.F.R. 404.1566(e). Social Security Ruling 83-12 provides that, ``[i]n cases of unusual limitation of ability to sit or stand, a [vocational expert] should be consulted to clarify the implications for the occupational base." Social Security Ruling 83-12, reprinted in *West's Social Security Reporting Service*, at 40 (1992). Although primarily used at Step Five of the evaluative process to determine whether a claimant who has been found unable to do past relevant work can perform other work, the testimony of a vocational expert may be sought at Step Four as well. *See* Social Security Ruling 82-61, reprinted in *West's Social Security Reporting Service*, at 838 (1983).

In his hypothetical question to the vocational expert, Paul Murgo, the Administrative Law Judge asked:

> [L]et us assume for purposes of the hypothetical that . . . the claimant is unable to do anything but sedentary work and he needs to sit or stand at will. What kinds of either sedentary, semi-skilled or unskilled work could he do if he didn't have the need to lie down during the day but could manage to work a full day . . . [at this point the vocational expert interjects ``eight hour day"] . . . by sitting and standing?

Record p. 54. The vocational expert then characterized the plaintiff's previous position as a semi-

skilled order clerk as sedentary and stated that in addition to this past relevant work there were several semi-skilled or unskilled sedentary positions existing in significant numbers in the national economy where he could alternate between sitting and standing as necessary. *Id.* at 54-55. He listed several jobs in each category.

Hypothetical questions must accurately reflect evidence in the record. *Arocho v. Secretary of Health & Human Servs.,* 670 F.2d 374, 375 (1st Cir. 1982). Specifically, ``in order for a vocational expert's answer to a hypothetical question to be relevant, the inputs into that hypothetical must correspond to conclusions that are supported by the outputs from the medical authorities." *Id.*

I have already determined that Dr. Leonard's report is competent evidence. Dr. Leonard indicated that the plaintiff is ``clearly able to be up and about all day long," but since ``he does get low back discomfort when sitting for more than an hour . . . I would want him to be in a job which would allow him to get up and move around after an hour of sitting." Record p. 285. Dr. Hall, a nonexamining, nontestifying physician concluded that the plaintiff could sit about six hours and stand for about two hours in an eight hour workday. *Id.* p. 64. Dr. Brinkman, another nonexamining physician who reviewed the records, supports this conclusion. *Id.* p. 181. The more recent notes of Dr. Jolda, the plaintiff's treating physician, indicate that the plaintiff ``continues to have a problem with [his] low back which precludes him [from] standing, sitting or walking for long periods." *Id.* p. 160. I conclude that there is ample evidence in the record to serve as the basis for the hypothetical question.

Taking into consideration the caselaw that addresses the weight to be given various medical opinions, *see, e.g., Berrios Lopez v. Secretary of Health & Human Servs.,* 951 F.2d 427, 431 (1st Cir. 1991) (report of nonexamining physician to be afforded greater weight when it contains careful consideration of medical reports of examining physician); *Keating v. Secretary of Health & Human Servs.*, 848 F.2d 271, 275 (1st Cir. 1988) (administrative law judge not required to give more weight to treating physician's report); *Rodriguez v. Secretary of Health & Human Servs.,* 647 F.2d

218, 223-24 (1st Cir. 1981) (while reports of nonexamining physicians are relevant, weight to which they are entitled varies with circumstances of each case), I find that the Secretary's determination is supported by substantial evidence.

Therefore, I recommend that the Secretary's decision be ***AFFIRMED***.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 22nd day of March, 1993.

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David M. Cohen
United States Magistrate Judge